

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN**

In re)
CITY OF DETROIT, MICHIGAN,) Chapter 9
Debtor.) Case No. 13-53846
) Hon. Steven W. Rhodes
) **Expedited Consideration**
) **Requested**

**THE OBJECTORS' MOTION TO ADMIT CERTAIN DEPOSITION
TESTIMONY OF KEVYN ORR AND KENNETH BUCKFIRE**

The Objectors¹ hereby move this court pursuant to Federal Rules of Civil Procedure 26 and 32(a), made applicable to this proceeding by Federal Rules of Bankruptcy Procedure 7026 and 7032, for entry of the proposed order attached hereto as Exhibit 1 admitting the deposition testimony identified in Exhibit 6-A and Exhibit 6-B² for purposes of the upcoming evidentiary hearing relating to the *Motion of Debtor for Entry of an Order (I) Authorizing the Assumption of that*

¹ This motion is joined by Syncora Capital Assurance Inc. and Syncora Guarantee Inc. ("Syncora"), Erste Europäische Pfandbrieffund Kommunalkreditbank Aktiengesellschaft in Luxemburg S.A., DEPFA Bank PLC, Ambac Assurance Corporation, National Public Finance Guarantee Corporation, Assured Guaranty Municipal Corp., Financial Guaranty Insurance Company, the Police and Fire Retirement System of the City of Detroit and the General Retirement System of the City of Detroit, and the Official Committee of Retirees.

² In an effort to minimize the number of motions submitted to the Court, all of the deposition designations submitted by the undersigned objectors are contained in Exhibits 6-A and 6-B.

Certain Forbearance and Optional Termination Agreement Pursuant to Section 365(a) of the Bankruptcy Code, (II) Approving Such Agreement Pursuant to Rule 9019, and (III) Granting Related Relief, dated July 18, 2013 [Docket No. 17] (the “Assumption Motion”). In support thereof, the Objectors state as follows:

JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue for this matter is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

LEGAL STANDARD

2. Federal Rule of Civil Procedure 32(a)(1) provides that, “[a]t a hearing or trial, all or part of a deposition may be used against a party on these conditions: (A) the party was present or represented at the taking of the deposition or had reasonable notice of it; (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (C) the use is allowed by Rule 32(a)(2) through (8).” FED. R. CIV. P. 32(a)(1).

3. Under Federal Rule of Civil Procedure 32(a)(3), “[a]n adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party’s officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).” FED. R. CIV. P. 32(a)(3).

4. In the Sixth Circuit, a “managing agent” for purposes of Rule 32(a)(3) is any person who possesses the following authority and attributes:

- a. Acts with superior authority and is invested with general powers to exercise his judgment and discretion in dealing with his principal’s affairs (as distinguished from a common employee, who does only what he is told to do; has no discretion about what he can or cannot do; and is responsible to an immediate superior who has control over his acts);
- b. Can be depended upon to carry out his principal’s directions to give testimony at the demand of a party engaged in litigation with his principals; and
- c. Can be expected to identify himself with the interests of his principal rather than those of the other party.

In re Air Crash at Lexington, Kentucky, August 27, 2006, 71 Fed. R. Serv. 3d 313, 2008 WL 2954971, at *4 (E.D. Ky. Jul. 30, 2008) (*citing Brandon v. Art Centre Hospital (Osteopathic)*, 366 F.2d 369, 372 (6th Cir. 1966)).

RELIEF REQUESTED AND BASIS FOR RELIEF

5. In this case, the Objectors are submitting the deposition testimony of Kevyn Orr and Kenneth Buckfire, both of whom qualify as managing agents for purposes of Rule 32(a)(3). The deposition testimony that the Objectors intend to submit is attached hereto as Exhibits 6-A and 6-B.

6. The deposition testimony of Kevyn Orr satisfies the standards of Federal Rule 32. First, Mr. Orr was represented at his deposition by Jones Day. Second, the Objectors intend to use Mr. Orr’s deposition testimony to the extent it

would be admissible under the Federal Rules of Evidence if Mr. Orr were present and testifying (*i.e.*, as party admissions under Federal Rule of Evidence 801(2)(d)). Third, Mr. Orr was one of the City’s “managing agents” at the time of his deposition on August 30, 2013.

7. At that time, Mr. Orr was emergency manager of the City of Detroit. (Exhibit 6-C, Orr Dep. Excerpts 83:13-20; *Declaration of Kevyn D. Orr in Support of Detroit, Michigan’s Statement of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code* [Docket No. 11] (“Orr Declaration”) ¶ 1.) As emergency manager, Mr. Orr acted for, and in the place and stead of, the City’s elected mayor and city council, and exercised authority over nearly all aspects of the City’s government and management, including, but not limited to, budgeting, operations, financial affairs, contracts, appropriations, collective bargaining, and the use, sale and lease of assets. (Orr Declaration ¶ 2.)

8. Given the broad scope of Mr. Orr’s authority, Mr. Orr acts, as set out in *In re Air Crash*, “with superior authority and is invested with general powers to exercise his judgment and discretion in dealing with [the City’s] affairs.” Accordingly, he qualifies as a managing agent for purposes of Federal Rule 32(a)(3).

9. The deposition testimony of Kenneth Buckfire also satisfies the standards of Federal Rule 32. First, Mr. Buckfire was represented at his deposition

by Jones Day. Second, the Objectors intend to use Mr. Buckfire's deposition testimony to the extent it would be admissible under the Federal Rules of Evidence if Mr. Buckfire were present and testifying (*i.e.*, as party admissions under Federal Rule of Evidence 801(2)(d)). Third, Mr. Buckfire was one of the City's "managing agents" at the time of his deposition on August 30, 2013.

10. At that time, Mr. Buckfire was the co-founder and co-president of Miller Buckfire & Company, which was the company engaged by the City as its investment banker. (Exhibit 6-D, Buckfire Dep. Excerpts 11:14-20.) As part of this engagement, "Mr. Buckfire was the lead negotiator for the City on the business terms of what became the forbearance agreement." (Exhibit 6-C, Orr Dep. Excerpts 15:25-16:4.) As lead negotiator, Mr. Orr "directed Mr. Buckfire to do whatever needed to be done to get the agreement in principle resolved and signed." (*Id.* at 76:13-15.) To accomplish this task, Mr. Orr "authorized Mr. Buckfire to negotiate the best possible deal he could with the Swap counterparties." (*Id.* at 36:25-37:4.)

11. Accordingly, Mr. Buckfire qualifies as a managing agent under Federal Rule 32. To begin, Mr. Buckfire had the authority to exercise his judgment and discretion to negotiate the best possible terms with the Swap Counterparties. *See In re Air Crash*, 2008 WL 2954971, at *4 (stating that a managing agent is a person who "is invested with general powers to exercise his

judgment and discretion in dealing with his principal's affairs"). And, after Mr. Buckfire had negotiated each of the terms of the Forbearance Agreement, he was the one who instructed Mr. Orr that the City should take the deal Mr. Buckfire had negotiated. (Exhibit 6-C, Orr Dep. Excerpts 37:5-9.) In addition, Mr. Buckfire's appearance at his deposition and the upcoming evidentiary hearing demonstrate that he satisfies the other two factors set out in *In re Air Crash* — namely, that he can (a) be depended upon to carry out the City's direction to provide testimony and (b) be expected to identify himself with the interests of the City as opposed to the Objectors.

12. Finally, it should be noted that, in addition to the fact that the depositions of Messrs. Orr and Buckfire are independently admissible, granting this Motion will permit counsel to focus their cross-examinations on the most salient points, which will help to streamline the hearing on the Assumption Motion.

13. In filing this motion, the Objectors reserve their right to designate additional deposition testimony based on the evidence introduced at the hearing, consistent with any Orders of the Court regarding post-hearing submissions.

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WHEREFORE, the Objectors request that this Court grant the relief requested in this motion and enter an order consistent with the proposed order attached as Exhibit 1.³

Dated: September 19, 2013

Respectfully submitted,

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³ In accordance with Local Rule 9014-1, on September 18, 2013, William Arnault, counsel for Syncora, conferred telephonically with Gregory Shumaker, counsel for the City, and sought concurrence regarding the issues the Objectors intended to raise in this motion. Mr. Shumaker refused to concur in the Objectors' motion.

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